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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948

No. 524

MARK BARRETT COSBY,

Petitioner

v.

DAVID H. HARTS, FLORENCE J. HARTS and PERCY B. JOHNSTON,

Respondents

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I.

Cosby Sr. was not divested of title by the order of sale; he and Cosby Jr. were entitled to a true judicial hearing on objections.

The assertions in respondents' brief under Point A that Cosby Sr. was divested of title to the land to be sold by the decree of sale on June 6, 1938, and that Cosby Sr. had no inheritable right in the land thereafter, but only a "mere privilege of objection," are entirely unsupported in law and directly contrary to the numerous authorities cited at Point II, page 16, of petitioner's brief. We particularly call attention to *LeMoyne v. Harding*, 132 Ill. 23, 23 N.E. 414 (1890); *Retzinger v. Retzinger*, 337 Ill. 378,

169 N.E. 176 (1929). The very quotation from *Ehrgott v. Seaborn*, 363 Ill. 292, 295 (1936) relied upon by respondents makes three references to the "*judicial discretion*" required of the Court in passing on a sale. The *Ehrgott* case does not hold that a court may approve a sale on its own motion or over objections of the holders of the title without a hearing. In that case the court had held a proper hearing on the report of sale and the objections filed, and there was no question but that the trial court had proceeded in a proper judicial manner. The kind of "administrative" discretion contended for by respondents (their brief, page 30) is directly contrary to the wording of the statute itself which requires a regular judicial hearing on the report and objections filed.

Any additional notice necessary to give Cosby Jr. an opportunity to be heard on objections in a proper judicial hearing is not only proper under the statute (*Verdun v. Barr*, 253 Ill. 120, 127, 97 N.E. 239 (1912)) but must be impliedly authorized and required by the statute in order to make the statute itself constitutional. (*Londoner v. Denver*, 210 U.S. 373, 52 L. Ed. 1103 (1908)).

II.

The County Court's jurisdiction over Cosby Sr. until his death did not empower the Court to render a decree which would bind Cosby Jr. without notice and hearing.

Respondents have wholly failed to answer Point III, pages 17-24, of petitioner's brief. They have failed to cite any case holding that a court can constitutionally enter judgment over objections filed and pending where the court knows that the predecessor in interest is dead, without giving the successors notice and an opportunity to protect their rights. Instead, respondents argue that the County Court did not lose "jurisdiction" of the cause merely on account of the death of Cosby Sr., and cite the case of *Claflin v. Dunne*, 129 Ill. 241, 21 N.E. 834 (1889), and other authorities in support of that rule. That argument and those authorities had no application to the present case. It is not the death of Cosby Sr., but rather the failure of the Court to provide a hearing on objections while knowing of Cosby Sr.'s death, that is most significant in the present case. The possession of "jurisdiction" by a court does not authorize it to act arbitrarily or without regular judicial procedure in arriving at its determination. *Windsor v. McVeigh*, 93 U.S. 274, 25 L. Ed. 914

(1876); *U. S. v. Walker*, 109 U.S. 258, 27 L. Ed. 927 (1883). And its knowledge that the predecessor in interest has died requires it, in due process, to give the successor an opportunity to be heard before it can validly cut off his rights. *Brown v. Fletcher's Estate*, 210 U.S. 82, 52 L. Ed. 966 (1908); *Hopkins v. Curtis*, 43 R. I. 19, 21, 109 Atl. 711, 712 (1920); *Harris v. Chicago Title & Trust Co.*, 338 Ill. 245, 266, 170 N.E. 285, 294 (1930).

Far from holding contrary to the above authorities, the opinions in *Claflin v. Dunne*, 129 Ill. 241, 21 N.E. 834 (1889) and similar Illinois cases, carefully distinguish the situation there before the Court from cases in which the Court knows of the predecessor's death and there has been no hearing or trial. In the *Claflin* case the Court was careful, on page 245 of its opinion, to limit the question there at issue to ". . . whether, after the filing of the plea, the death of Claflin, *without notice of death being brought to the attention of the Court, deprived the Court of jurisdiction to render a judgment in the cause.*" The same limitation of the issue appears in *Danforth v. Danforth*, 111 Ill. 236 (1884). In both of those cases, relied upon by respondents, the Court had not known of the death of the party and had proceeded with a full and fair trial of the issues involved, at which the decedent had been fully represented by counsel.

In addition to the foregoing, the above cases relied upon by respondents are not in point because they involve actions in *assumpsit* and the like, and have nothing whatever to do with the effect of a judgment, in a proceeding to sell real estate, on the title of non-parties who have succeeded to the title on the death of a party before judgment and before hearing. In proceedings to sell real estate, where such proceedings are adversary in nature and are not *in rem*, it has been uniformly held that non-parties who have succeeded to the title on the death of a party before judgment are not bound by the judgment. *Rives v. Stanford*, 188 Okla. 108, 109, 106 P. (2d) 1101, 1103 (1940); *Hoffman v. Hanley*, 187 Ill. App. 551 (2d Dist. 1914); and cases cited under Point IV, page 25, of petitioner's brief. At page 26 of their brief, respondents seem to admit the validity of the cases cited by petitioner and the rule thereof; nevertheless, respondents at page 18 of their brief cite other cases in support of their position. All of the cases cited by respondents are readily distinguishable from the case at bar. In none of them

were objections or pleadings on file which were denied judicial hearing by the Court. That distinction alone renders them unavailing to respondents as an answer to Point III of petitioner's brief. The case of *Yaple v. Titus*, 41 Pa. St. 195, 80 Am. Dec. 604 (1861), was not even adversary, but was a summary proceeding had by the guardian or conservator for the benefit of his incompetent ward. In such cases everything done by the guardian is presumed by law to be for the ward's benefit and jurisdiction of the court over the guardian and the property is all that is required. That type of case in Illinois has been expressly distinguished from proceedings to sell real estate to pay debts of a decedent, which are expressly held to be adversary in their nature. *Gibson v. Roll*, 27 Ill. 88, 90 (1862); see Point II, p. 15 of petitioner's brief. The same distinction is made in *Pfister v. Johnson*, 13 Fed. Supp. 662, 665 (N.D. Okla. 1936).

Defendants' other cases, *Palmerton v. Hoop*, 131 Ind. 23, 30 N.E. 874 (1892); *McCormick v. Paddock*, 20 Neb. 486, 30 N.W. 602 (1886); *Shea v. Shea*, 154 Mo. 599, 55 S.W. 869 (1900); *Pugh v. McCue*, 86 Va. 475, 10 S.E. 715 (1890), are actions *in rem* and involve the validity of default judgments against persons over whom jurisdiction had been acquired, either by name or as "unknown owners," under applicable publication statutes. They have no bearing whatever on proceedings to sell real estate to pay debts of a decedent in Illinois, which have uniformly been held to be actions *inter partes* requiring personal service of summons and personal jurisdiction of the title holders. (Point II, p. 15, petitioner's brief and cases there cited.)

The defendants rely heavily on the case of *Palmerton v. Hoop*, 131 Ind. 23, 30 N.E. 874 (1892). That case is readily distinguishable from the case at bar in several vital respects. The father of the plaintiffs in that case was the administrator petitioning for the sale and at the time of his death there were no objections of any kind pending before the court. Under the Indiana statute then in force governing sales of real estate of decedents to pay debts (*Ind. Rev. Stat.* (1876) pp. 519-532, sec. 75-102 of c. 2 of Part Fourth) such actions were purely *in rem*, and were wholly summary in character. There was no requirement that any persons be made parties either by name or otherwise and the action was begun by filing a petition and publishing notice of the time and place of hearing such pe-

tition. (Sec. 75, p. 521.) There were no parties to the proceedings as such and, assuming a proper publication of the notice of the petition, the court's orders were binding against every one. Under sec. 100 of the same statute (p. 531) no hearing whatever was required on the confirmation by the court and no provision was made for filing objections to the report of sale. Proceedings under the Illinois statute are entirely different in their nature, requiring jurisdiction of the court over the title holders personally and individually and requiring adversary trial of issues. The question whether the Indiana statute authorized the taking of plaintiffs' property without due process of law was never raised in the *Palmerton* case.

Respondents have not answered Points IV and V, pages 24-33, of petitioner's brief, except to assert that any rights of Cosby Jr. "were purely derivative" from Cosby Sr. As shown above, in adversary proceedings to sell real estate, non-party successors of a titleholder who dies before judgment are uniformly held not to be in such privity with their predecessor as will cause them to be bound by the decree.

Nor do respondents make any argument or cite any authority to show how Cosby Jr. could be bound by a "privity" based on the decision in *Johnston v. Cosby*, 374 Ill. 407, 29 N.E. (2d) 608 (1940), rendered more than two years after the sale proceeding in Logan County, when such "privity" could not exist under the express finding of the Logan County Court in its decree of sale. Although respondents argue that the decree of sale is "unimpeached and unimpeachable," their claim that Cosby Jr. was bound by "privity" is based on the assumption that the determination of interests under that decree of sale was impeached or over-ruled, by the later case of *Johnston v. Cosby*. They do not and cannot dispute that, *at the time it was entered*, the order of sale was completely void as to all freehold interest except the life estate in Cosby Sr., which terminated on his death shortly thereafter or that an ejectment suit brought by Cosby Jr. against Harts immediately following the sale proceeding would necessarily have been successful.

Nor do respondents attempt to show how a "privity" based on a decision rendered long after the sale proceeding, can afford Cosby Jr. that representation in the sale proceeding to which he was constitutionally entitled before being bound by the decrees of the Logan County Court.

Respondents make no answer of any kind to Point V, pages 29-33, of petitioner's brief, and we submit that, on this point alone, the decrees of the Logan County Court are entirely ineffective to bind the interest of Cosby Jr. in the land, and Cosby Jr. is entitled to disregard those decrees and in this suit have Harts held to be a constructive trustee of the property for the benefit of Cosby Jr.

III.

Cosby Jr.'s supposed right to re-open the sale proceeding in the County Court of Logan County after he reached his majority does not furnish that due process required to make valid the decrees of sale and confirmation.

Respondents take the position that the requirements of due process are satisfied by the rule in Illinois that a minor can re-open a proceeding in the court where the judgment was rendered, after he attains his majority. At the same time, they insist that the minor could not, after re-opening, prevail against a *bona fide* purchaser. This Court has held such an argument to be wholly fallacious in the case of *Griffin v. Griffin*, 327 U.S. 220, 90 L. Ed. 635 (1945). In that case the wife had obtained a judgment for accrued alimony without giving the husband any notice or opportunity to be heard and had filed suit on the judgment in another jurisdiction. It was argued on behalf of the wife that, because the New York practice allowed such a judgment to be set aside upon a subsequent showing of defenses by the husband, the judgment did not deprive him of any right and was therefore not wanting in due process. This Court denied that contention and held that "Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights." (Page 231), and said:

> "If New York, by its practice, recognizes the ineffectiveness of such a judgment, that could not be made a ground for giving the judgment effect elsewhere more than any other judgment rendered without notice. It might as well be said that any judgment which does not validly cut off defenses because rendered without due process may be made the basis of suit elsewhere subject to those defenses. To the extent that New York refuses, if it does refuse, to set aside the judgment of 1938 unless there be some affirmative showing that there was a meritorious substantive defense to its entry, there is an assertion of power in

the court to enter a money judgment and issue execution upon it without notice." (Page 231.)

It is clear from the above decision of this Court that neither the supposed right of the minor to re-open the sale proceeding, nor the right of Cosby Jr. to have the decrees of the Logan County Court set aside in a *coram nobis* or similar proceeding in the County Court (supposed to exist by the Circuit Court of Appeals, in its opinion, R. 436) furnishes that due process to which Cosby Jr. was entitled before a final judgment was rendered by the County Court in the sale proceeding.

IV.

The decrees of the Logan County Court, which were ineffective to bind the interest of Cosby Jr. because of lack of due process, could not be validated by any due process in the present suit.

Respondents argue in Point C of their brief that the trial in the district court on the issue of fraud in the sale, has afforded Cosby Jr. due process sufficient to validate the former decrees of the County Court of Logan County. No authorities are cited by respondents to the point. The argument is directly contrary to the decisions of this and other courts. When, as in the present case, the former decrees were, when rendered, wholly ineffective to bind the interest of a person not made a party, no supplementary or later proceeding in any court can make such decrees effective against such person. *Pennoyer v. Neff*, 95 U.S. 714, 728, 24 L. Ed. 565 (1878); *Riverside Mills v. Menefee*, 237 U.S. 189, 195-97, 59 L. Ed. 910 (1915); *Odell v. Levy*, 307 Ill. 277, 280-82, 138 N.E. 608 (1923). As stated by this Court in *Pennoyer v. Neff*, at page 728:

> "The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. . . . This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

In *Odell v. Levy*, 307 Ill. 277, 280-82, 138 N.E. 608 (1923), a mortgagee obtained a decree of foreclosure and sale of certain property under a mistake as to who were the rightful owners, without joining the true owners as parties.

After the sale had been approved by the court the mortgagee and the purchaser filed a supplemental bill against the true owners setting up the mistake, and praying that their interests be subjected to the foreclosure and period of redemption under the original decree. The lower court granted the prayer but the Supreme Court reversed saying, in 307 Ill. at p. 280:

> "The decree of foreclosure as to the plaintiffs in error was void. They were not parties to it. They were the equitable owners of the equity of redemption, and it is well settled that a decree of foreclosure in a proceeding to which the person having the equity of redemption is not a party is a nullity as to him. (Rodman v. Quick, 211 Ill. 546.) There was no authority for making them parties to the decree of foreclosure and binding them by the sale made under it by means of a supplemental bill. *Since the decree was void as to them, the court could not in any kind of a proceeding give it any validity against them.* Their land was subject to the mortgage debt in accordance with the terms of the mortgage, which could be enforced against them only in accordance with the usual and ordinary process of foreclosure. A decree to which they were not parties was not even *prima facie* evidence against them of anything and they could not through any proceeding be bound by its terms." (Emphasis supplied.)

To Cosby Jr., who brought this suit to protest against the taking of his property without due process of law, it is no answer to say that in his case due process would have led to the same result. *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424, 59 L. Ed. 1027 (1915); *Rees v. Watertown,* 19 Wall. 107, 123, 22 L. Ed. 72 (U. S. 1874); *Mitchell v. Banking Corp. of Mont.,* 94 Mont. 183, 187, 22 Pac. (2d) 155 (1933). The present suit was brought for the very purpose of contesting the validity of the decrees of the County Court against Cosby Jr. Proceedings to sell real estate to pay debts are purely statutory in Illinois and the federal district court has no jurisdiction to make either an order of sale or an order of confirmation under the statute.

Even if Cosby Jr. could lawfully be bound by a subsequent validation of the sale proceeding, he must first be given the opportunity to redeem the land from the sale. Cosby Jr. made a formal offer to Harts, prior to filing suit,

to redeem the land by reimbursing him his expenditures (R. 14, 318-21) which offer was refused by Harts (R. 42). Also in their complaint, plaintiffs stated that they were ready and willing to pay Harts, as a condition to the conveyance of said farm to them, such amount as the court shall decree necessary to do equity in the premises.

Under well established law in Illinois, Cosby Jr. holds the title to a two-thirds interest in the land until a confirmation of sale has been entered which is valid against him. See Point II, page 16, of petitioner's brief. Until that time, Cosby Jr. has not only the title but also has the right to redeem the land. Regardless of whether the sale is one which merits confirmation, where a confirmation decree has been improperly entered without giving the heir an opportunity to redeem, the confirmation must be set aside to give the heir such opportunity. *Retzinger v. Retzinger,* 337 Ill. 378, 169 N. E. 176 (1929). Thus Cosby Jr. has a right of redemption for which he is entitled to constitutional protection; having offered, both before suit and in his complaint, to redeem, he could not lawfully be bound by any subsequent confirmation in any court.

CONCLUSION

Cosby Jr., who was not made a party in the County Court, has been completely deprived of his property to which he is entitled under the fundamental rule of *res judicata* and due process established and re-established without contradiction by cases in all jurisdictions as a basic principle of American and English jurisprudence, which rule is that a prior judgment cannot lawfully or constitutionally be conclusive and binding as to any person who has had no opportunity to litigate, in a court of competent jurisdiction, in adversary proceedings, the matters on which the judgment is founded. Defendants have completely failed to answer this argument of petitioner or show that this fundamental rule is not determinative of this case.

Correct and constitutional application of the principles of *res judicata* and due process to this case can result only in a decision that Cosby Jr. is entitled to his two-thirds interest in the land unaffected by the decrees of the Logan County Court, together with the rents, issues and profits therefrom, upon making such reimbursement to Harts as the Court may deem equitable in the premises.

Respectfully submitted,

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